BANK KERJASAMA RAKYAT (M) BHD v. KOPERASI SERBAGUNA IMAN MALAYSIA BHD; MAYBANK ISLAMIC BHD & ORS (GARNISHEES)

HIGH COURT MALAYA, KUALA LUMPUR
ATAN MUSTAFFA YUSSOF AHMAD JC
[SUIT NO: WA-22M-127-03-2019]
10 MAY 2021

CIVIL PROCEDURE: *Proceedings – Garnishee proceedings – Judgment given in favour of judgment creditor – Judgment creditor demanded for payment of judgment sum from judgment debtor – Payment not forthcoming – Judgment debtor filed notice of application for garnishee order against garnishee banks to attach all debts due or accruing due by garnishees to judgment debtor to answer judgment – Whether monies in garnishee banks belonged to judgment debtor – Whether could be garnished – Rules of Court 2012, O. 14A*

Judgment was given in favour of the plaintiff, the judgment creditor ('JC'), pursuant to O. 14A of the Rules of Court 2012 ('ROC'), that the defendant, the judgment debtor ('JD'), should pay the JC a total sum of RM317,836,534.74. The JC (i) demanded for the payment of the judgment sum from the JD but this was not forthcoming; (ii) filed a notice of application for a garnishee order against six garnishees, which were six different banks, in order to attach all the debts due or accruing due by the garnishees to the JD to answer the judgment; and (iii) obtained a garnishee order to show cause against the garnishees to disclose the information of all the JD's current accounts, savings accounts and/or fixed deposit accounts and accounts indebted to the JD. In response, the first garnishee confirmed that they were indebted to the JD for a sum of RM67,845.97 ('monies in first garnishee') while the fifth garnishee confirmed that they were indebted to the JD for a sum of RM22,278.22 ('monies in fifth garnishee'). The JC withdrew the application against the second, third, fourth and sixth garnishees and only proceeded against the first and fifth garnishees. The first and fifth garnishees did not object to the application by the JC but the JD did as, according to the JD, the monies did not belong to it as (i) the monies in the first garnishee were wage subsidy by the Government pursuant to the Pakej Ransangan Ekonomi Prihatin Rakyat ('Prihatin Package'); and (ii) the monies in the fifth garnishee belonged to the JD's members in respect of early settlement of financing facilities granted by Koperasi Pembiayaan Syariah Angkasa Bhd ('KOPSYA') and Kooperasi Co-opbank Pertama Malaysia Bhd ('Co-opbank'). The Senior Assistant Registrar ('SAR') dismissed the notice of application, declining to make an order absolute against the first and fifth garnishees as the SAR was of the view that the monies in the first and fifth garnishees did not belong to the JD and thus could not be garnished. Hence, the present appeals against the SAR's decision in respect of the first and fifth garnishees.

Held (allowing appeals):

(1) The wage subsidy was given by the Government under the Prihatin Package to be disbursed to the JD without condition. Despite the JD's contention that it was subject to legal action if it failed to disburse the monies in the first garnishee to the JD's employees, there was no proof provided by the JD that such a sanction existed. How the wage subsidy operated was that when the Government gave the wage subsidy to the JD, this was an assistance to allay the hardship of the JD who had to continue with the payment of salaries to its employees during the pandemic. There was no evidence adduced by the JD to show that there was any condition for the employers as to how to specifically utilise the wage subsidy once this had been received. The JD was free to deal with the monies in the first garnishee. A garnishee order may be allowed when a JD is free to deal with the monies/debt from the garnishee. Order absolute was granted against the first garnishee. (paras 33-35, 37 & 40)

(2) The garnishee had the evidential burden to show cause why an order absolute should not be made. The JD must also bear the same burden to prove the same. However, the JD had not successfully proven that the monies in the fifth garnishee belonged to the members of the JD as early settlement of financing facilities KOPSYA and Co-opbank. The assertion was a bare allegation. If it was true, the JD should have exhibited documents to this effect. Order absolute was granted against the fifth garnishee. (paras 43-45 & 48)

Case(s) referred to:

D Wilson (Birmingham) Ltd v. Metropolitan Property Developments Ltd [1975] 2 All ER 814

Hong Leong Finance Bhd v. Low Thiam Hoe & Another Appeal [2015] 8 CLJ 1 FC

Malaysian International Trading Corporation Sdn Bhd v. RHB Bank Bhd [2016] 2 CLJ 717 FC

NCFM Enterprise Sdn Bhd v. Kejuruteraan Rasshin Sdn Bhd & Ors [2011] 10 CLJ 572 HC

Pernas Trading Sdn Bhd v. Senali Construction Works Sdn Bhd & Anor [1991] 2 CLJ 1587; [1991] 3 CLJ (Rep) 439 HC

Ramalingam Muthusamy v. Chong Kim Fong; Lembaga Kemajuan Tanah Persekutuan (Garnishees) [1977] 1 LNS 105 HC

SK M&E Bersekutu Sdn Bhd v. Pembinaan Legenda Unggul Sdn Bhd & Another Appeal [2019] 4 CLJ 590 FC

Tan Way Boon & Ors. v. Omar Marican Holdings Sdn Bhd & Ors [1990] 2 CLJ 700; [1990] 3 CLJ (Rep) 202 HC

Tesco Stores (Malaysia) Sdn Bhd v. Ananda Kumar Krishnan [2017] 5 CLJ 315 CA

Legislation referred to:

Co-operative Societies Act 1993, s. 9

Employment Act 1955, s. 31(1)

Rules of Court 2012, O. 14A, O. 49 r. 1(1), (3)

For the judgment creditor/plaintiff - Abdul Rashid Ismail & Uthman Abdul Ghani; M/s Rashid Zulkifli
For the judgment debtor/defendant - Ahmad Syiimir Suffian & Nurul Assyiqin Ridzoni; M/s Amar Izzat & Co

Reported by Lina E

JUDGMENT

Atan Mustaffa Yussof Ahmad JC:

[1] These are appeals by the judgment creditor/plaintiff against the following decisions:

(i) the learned Senior Assistant Registrar's ("SAR") decision in dismissing the judgment creditor's notice of application dated 14 February 2020 and in refusing to make an order absolute against the first garnishee, Maybank Islamic Bhd, that all the debts due or accruing due by the first garnishee to the judgment debtor be attached to answer a judgment dated 6 January 2020 obtained by the judgment creditor against the judgment debtor pursuant to the judgment entered in the Kuala Lumpur High Court in Civil Suit No. WA-22M-127-03-2019 ("the judgment"); and

(ii) the learned SAR's decision in dismissing the judgment creditor's notice of application dated 14 February 2020 and in refusing to make an order absolute against the fifth garnishee, AmBank Islamic Bhd, that all the debts due or accruing due by the fifth garnishee to the judgment debtor be attached to answer the judgment obtained by the judgment creditor against the judgment debtor pursuant to the judgment.

[2] After reading the affidavits together with written submissions filed for both the judgment creditor and the judgment debtor and listening to the oral submissions of counsels, I allowed both the appeals in encls. 31 and 32 with costs of RM3,000 each to the judgment creditor. My grounds for the decision are stated below.

Background Facts

[3] On 6 January 2020 the judgment in favour of the judgment creditor was given pursuant to an application under O. 14A of the Rules of Court 2012 ("ROC 2012") by this court. It was adjudged that the judgment debtor should pay the judgment creditor a total sum of RM317,836,534.74 as at 28 February 2019 and costs on solicitor-client and full indemnity basis.

[4] The judgment creditor demanded for the payment of the judgment sum from the judgment debtor but this was not forthcoming. Thus on 14 February 2020, the judgment debtor filed a notice of application for a garnishee order against the six garnishees, who are six different banks, in order to attach all the debts due or accruing by the garnishees to the judgment debtor to answer the judgment. The garnishees are Maybank Islamic Bhd ("first garnishee"),

CIMB Bank Bhd ("second garnishee"), Koperasi Co-opbank Pertama Malaysia Bhd ("third garnishee"), Bank Mualamat Malaysia Bhd ("fourth garnishee"), AmBank Islamic Bhd ("fifth garnishee") and AmBank Malaysia Bhd ("sixth garnishee"). The six garnishees are referred together as "the garnishees".

[5] On 9 June 2020, the judgment creditor obtained a garnishee order to show cause against the garnishees to disclose the information of all the judgment debtor's current accounts and/or saving accounts and/or fixed deposit accounts and accounts indebted to the judgment debtor. In response, the first garnishee by way of a letter dated 7 July 2020 confirmed that they are indebted to the judgment debtor for a sum of RM67,845.97 as at 26 June 2020 ("monies in first garnishee"). The fifth garnishee by way of a letter dated 24 July 2020 confirmed that they are indebted to the judgment debtor for a sum of RM22.278.22 as at 2 July 2020 ("monies in the fifth garnishee"). On 7 September 2020, the judgment creditor withdrew the application against the second, third, fourth and sixth garnishees. The judgment creditor only proceeded the garnishee proceedings against the first and fifth garnishees.

[6] The first and fifth garnishees did not object to the application by the judgment creditor. However, the judgment debtor objected to the judgment creditor's application to garnish the monies in the first and fifth garnishees. The judgment debtor contended that the monies in the first garnishee in Account No. 562405612785 cannot be garnished as they are monies subsidised by the Government pursuant to the Pakej Ransangan Ekonomi Prihatin Rakyat ("Prihatin Package"). The judgment debtor also contended that the monies in the fifth garnishee cannot be garnished as they are monies belonging to its members in respect of early settlement of financing facilities granted by Koperasi Pembiayaan Syariah Angkasa Bhd ("KOPSYA") and Koperasi Co-opbank Pertama Malaysia Bhd ("Co-opbank").

[7] On 28 September 2020, the learned SAR dismissed the notice of application, declining to make an order absolute against the first and fifth garnishees as the learned SAR was of the view that the monies in the first and fifth garnishees do not belong to the judgment debtor and thus cannot be garnished.

[8] The judgment creditor filed notices of appeal against the SAR's decisions in encl. 31 in respect of the first garnishee and in encl. 32 in respect of the fifth garnishee.

The Law On Garnishee Proceedings

[9] Garnishee proceedings are governed by O. 49 r. 1(1) of the ROC 2012:

(1) Where a person (who is referred to as "the judgment creditor" in this Order) has obtained a judgment or order for the payment of money by some other person (who is referred to as "the judgment debtor" in this Order), not being a judgment or order for the payment of money into Court, and any other person within the jurisdiction (who is referred to as "the garnishee" in this Order), is indebted to the judgment debtor, the Court may, subject to the provisions of this Order and of any written law, order the garnishee to pay the judgment creditor the amount for any debt due or accruing due to the judgment debtor from the garnishee, or so much thereof as is sufficient to satisfy that judgment or order and the costs of the garnishee proceedings.

[10] In respect of monies in bank accounts, the position is made clear in O. 49 r. 1(3) of the ROC 2012:

(3) In this Order, "any debt due or accruing due" includes a current or deposit account with a bank or other financial institution, whether or not the deposit has matured and notwithstanding any restriction as to the mode of withdrawal.

[11] Whether monies in a current or deposit account with a bank is a "debt due or accruing due" was clarified by the Federal Court in *Malaysian International Trading Corporation Sdn Bhd v. RHB Bank Bhd* [2016] 2 CLJ 717 which observed (per Suriyadi Halim Omar FCJ) as follows:

[37] In order to obtain a garnishment *order nisi* or an order absolute, the court must be convinced that the debt of the garnishee to the Judgment Debtor must relate to any debt due or accruing due to the judgment debtor. 'Any debt due or accruing due' is not exactly easy to understand, and as Jackson J in *Bank of Montreal v. IM Krisp Foods Ltd* (1996) 6 CPC (4th) 90 Sask CA said:

> Few phrases have been as problematic to define as "debt due or accruing due". The *Shorter Oxford English Dictionary*, 3rd ed. defines 'accruing as "arising in due course", but an examination of English and Canadian authority reveals that not all debts "arising in due course" are permitted to be garnished ...

[38] What is clear here is that "any debt due or accruing due" to the judgment debtor by the garnishee includes a current or deposit account with a bank or other financial institution, whether or not the deposit has matured, notwithstanding any restriction as to the mode of withdrawal (O. 49 r. 1(1)). For purposes of this appeal, without a need for a detailed discussion, the FD accounts under discussion are definitely a deposit account with a bank (in this case, the respondent) within the meaning of this rule.

[12] See also the Court of Appeal decision in the *Tesco Stores (Malaysia) Sdn Bhd v. Ananda Kumar Krishnan* [2017] 5 CLJ 315 where the court recognised that garnishee proceedings has been widely used to attach deposits and cash in bank accounts and such attachment procedure is straightforward in contrast to determining whether or not there is a debt due or accrued.

[13] However, the right of the judgment creditor to garnish monies in the judgment debtor's bank accounts is not unfettered and the court may refuse to exercise its discretion to make an order absolute only if a garnishee or a judgment debtor is able to prove that the debt due or accruing due to the judgment debtor is also due or accruing due to someone else, there is a statutory provision which expressly prohibits attachment of certain debt to be garnished, the debt has been equitably assigned to a third party and to grant order absolute would be unfair to the garnishee and other creditors which may cause undue preference among the creditors of an insolvent company.

[14] In *Ramalingam Muthusamy v. Chong Kim Fong; Lembaga Kemajuan Tanah Persekutuan (Garnishees)* [1977] 1 LNS 105; [1978] 1 MLJ 83 the High Court held that the debt must be a debt due by the garnishees (including bank institutions) to the judgment debtor and not to another. It was observed as follows:

> In my view it is abundantly clear from the working of rule 5(1) that debts owing or accruing solely to the judgment debtor only and not jointly with any other person can be attached under Order 43 rule 5(1). The phrase "whether solely or jointly with others" is restricted to property in the first part of the rule and does not apply to debts in the second half of the rule. The words "all debts owing or accruing ... to the judgment debtor" which appear in the second half of the rule are quite plain and mean only what they say: debts must be owing or accruing to the judgment debtor and not to the judgment debtor jointly with another person. The deliberate omission of the phrase "whether solely or jointly with others" in the second half of Order 43 rule 5(1) is a clear indication of the legislature's intention that joint debts shall not be seized by a garnishment notice.

[15] In *Malaysian International Trading Corporation Sdn Bhd v. RHB Bank Bhd* (*supra*), Suriyadi Halim Omar FCJ stated that where the debt has been equitably assigned by the judgment debtor to another, the money sought to be attached do not belong to the judgment debtor, this cannot be attached:

> [52] To entitle a garnishor to enter judgment against a garnishee the garnishor must at the outset establish that the money sought to be attached belongs to the JD. In *Badeley v. Consolidated Bank* (1888) 38 Ch D 238, it was held that "a creditor can only attach by a garnishee order such property of his debtor as the debtor could deal with properly and without violation of the rights of other persons".
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> [53] In *Plunkett v. Barclays Bank Ltd* (1936) 2 KB 107 judgment could not be entered to attach the money as it was actually trust money ie not of the JD. And if the debt due has been assigned, the alleged assignee must be given an opportunity to be heard (*Curran v. Newpark Cinemas Ltd* (1951) 1 All ER 295).
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> [54] Back home in Malaysia, in *Tan Way Boon & Ors. v. Omar Marican Holdings Sdn Bhd & Or*s [1990] 2 CLJ 700; [1990] 3 CLJ (Rep) 202; [1991] 1 MLJ 122, it was likewise held that a garnishee could not attach a debt

that had been equitably assigned. Similarly, a judgment creditor was not entitled to garnish monies which the JD had parted with his interest, prior to the date of the garnishment notice (see *Yeo Chiang Swee v. United Decorators And Shun Fah & Co The Said Yeo Chiang Swee Trading As Seng Hua Sawmill Co* [1932] 1 LNS 100; [1933] MLJ 85 and *Holt v. Heatkerfield Trust Lt*d [1942] 1 All ER 404).

[16] In *D Wilson (Birmingham) Ltd v. Metropolitan Property Developments Ltd* [1975] 2 All ER 814 it was held by the English Court of Appeal that granting an order absolute would be unfair to the garnishee and other creditors which may cause undue preference among the creditors of an estate that was wound up as an insolvent estate. Buckley J observed:

> We have been referred to some authorities. First I should mention *Pritchard v. Westminster Bank Ltd* where this court was concerned with a case in which an estate was being wound up as an insolvent estate. Where an estate is wound up as an insolvent estate under the Administration of Estates Act 1925 the effect is that the bankruptcy rules apply and they apply on the footing that the date of the death of the deceased is deemed to be the date at which a receiving order was made of bankruptcy, and the Act certainly provides that all debts due shall be paid *pari passu*. In a case of that nature where a garnishee order had been made this court held that it should not have been made because it would have the effect of conferring a preference on the judgment creditor and would conflict with the statutory provision that all debts proved should be satisfied *pari passu.* Lord Denning MR said ([1969] 1 All ER at 1001, [1969] 1 WLR at 549) that the court would 'not allow one creditor, however diligent he may be, to get an advantage over the others by getting in first with a garnishee order', and that the effect of attaching the debt of the judgment creditor would be to give a preference to him against all other creditors to which he was not entitled by the 1925 Act.

[17] With these principles in mind I proceed to consider the appeals.

The Judgment Debtor's Submissions

[18] In respect of the first garnishee it appears that there are three points of submissions by the judgment debtor that are presented:

(i) The judgment debtor had parted with its interest in the monies in the first garnishee intended to be garnished by the judgment creditor as these were a wage subsidy ("the wage subsidy") from the Government under the Prihatin Package which were held in trust by the judgment debtor and should not be garnished as the interest in the monies in the first garnishee lies with the judgment debtor's employees.

(ii) The creation of this trust was satisfied when the three essential features of certainty of words (intention), certainty of subject and certainty of object were present.

(iii) The judgment debtor had a duty to use the wage subsidy/monies in the first garnishee to pay its employees as if it fails to disburse the monies in the first garnishee to the employees, the Government can take legal action against the judgment debtor, through complaints made by judgment debt employees.

[19] Learned counsel for the judgment debtor referred me to a circular relating to the Prihatin Package entitled "Pertubuhan Keselamatan Sosial Pekeliling Majikan Bil. 5 Tahun 2020 (Tatacara Permohonan Program Subsidi Upah Oleh Majikan Bagi Setiap Pekerja Di Bawah Pakej Rangsangan Ekonomi Prihatin Rakyat)" where item 3.7 stated that employers who receive the wage subsidy programme assistance are subject to the conditions that they do not dismiss employees earning RM4,000 per month and below, deduct salaries and direct employees to take unpaid leave during the period of three months while receiving the wage subsidy payments and for three months thereafter. Item 3.7 in its original Bahasa Malaysia text is as follows:

> 3.7. Majikan yang menerima bantuan Program Subsidi Upah disyaratkan tidak boleh membuang pekerja yang berpendapatan RM 4,000 sebulan dan ke bawah, tidak boleh memotong gaji dan mengarahkan pekerja mengambil cuti tanpa gaji dalam tempoh tiga (3) bulan semasa menerima bayaran subsidi upah dan untuk tiga (3) bulan selepas itu.

[20] The judgment debtor contended that as of 27 July 2020 the total wage subsidy in its account with the first garnishee was RM124,789.41.

[21] Further in respect of the trust argument, learned counsel for judgment debtor referred me to the Federal Court case of *SK M&E Bersekutu Sdn Bhd v. Pembinaan Legenda Unggul Sdn Bhd & Another Appeal* [2019] 4 CLJ 590 which discusses the legal principles relating to the creation of trusts as below:

> 33. Now, reverting to the basics, it is a settled principle of law that in order for the legal relationship of trustee and beneficiary to come into existence as regards express private trusts, three essential features must be present. They are (a) certainty of words; (b) certainty of subject; and (c) certainty of object (See: *Tucker, Lynton, et al, Lewin on Trusts*, 19th ed., (London: Sweet & Maxwell, 2015) at page 102; Haley, Michael and Lara McMurty, "*The Three Certainties", Equity & Trusts*, 5th ed., (London: Sweet & Maxwell, 2017) at page 44); *Yeong Ah Chee v. Lee Chong Hai & Anor and Other Appeals* [1994] 2 MLJ 614 SC at 624). Under a trust, a party holding title to property is subject to an obligation to keep or use the property for the benefit of another party. The person holding the property for another's benefit is called a trustee, while the person benefiting from the trust is called the beneficiary. The property covered by the trust is the trust property.

[22] The judgment debtor submitted that there was "certainty of intention" as the wage subsidy was essentially given by SOCSO as the settlor to the judgment debtor as the trustee to be used by the judgment debtor for the purpose of paying the wages of the judgment debtor's employees as the beneficiaries, in line with the purpose of the Prihatin Package.

[23] The judgment debtor further submitted that the right of employees to the payment of salaries is a priority relying on s. 31 of the Employment Act 1955, thus the order absolute cannot be made as the interests of the employees of the judgment debtor have to be taken into account.

[24] In respect of the fifth garnishee the judgment debtor contends that the monies in the fifth garnishee belong to the members of judgment debtor as early settlement of financing facilities from KOPSYA and Co-opbank.

[25] In support of this contention the judgment debtor referred to an AmBank statement of the judgment debtor dated 21 August 2020 and letters dated 24 June 2020 and 17 June 2020 addressed to Mohd Zaidi bin Mohd Ali and Khamsiah Md Yunus respectively.

[26] The judgment debtor also referred to the first page of a letter from Co-opbank to the judgment debtor dated 14 April 2015 stating that Co-opbank has approved a facility described as "Pembiayaan Anggota Koperasi Pakej Khas Berjumlah (redacted)" under a *Bai Al Inah* contract. However, the court observed that this was to support the judgment debtor's averment in para. 10 of encl. 9 that the money in the Co-opbank Account No. 22-010-001613-8 belonging to the judgment debtor is a collection account where the money in the account is the proceeds of the refund for the financing to members who obtained the financing from the judgment debtor through ANGKASA salary deduction and that the money shall be paid by the judgment debtor to Co-opbank. The judgment debtor did not aver that this relates to the monies in the fifth garnishee.

[27] The judgment debtor also averred that the judgment creditor should abide by a direction by the Suruhanjaya Koperasi Malaysia ("SKM") in SKM's letter dated 4 June 2020 to negotiate with the judgment debtor on the method of repayment of the judgment creditor's claims and restructuring the financing so that payments can be made in installments, taking into account the unsatisfactory financial position of the judgment debtor.

The Judgment Creditor's Submissions

[28] In relation to the monies in the first garnishee, the judgment creditor submitted that the monies in the first garnishee belong to the judgment debtor only as no statute bars the said monies to be garnished by the judgment creditor and there is no evidence to show that the monies have been equitably assigned. Thus, the judgment debtor is free to utilise the monies and can be garnished by the judgment creditor. In support of this submission, the judgment creditor further submitted and contended as follows:

(i) The wage subsidy pursuant to the Prihatin Package was given by the Government without condition and the judgment debtor is free to deal with the monies. This was because how the mechanism of the wage subsidy operates is that the Government does not assume judgment debtor's responsibility in paying salaries to judgment debtor's employees when the wage subsidy is given to the judgment debtor but rather to "award" the judgment debtor and to encourage the judgment debtor in not terminating or cutting salaries of its employees during the Covid-19 pandemic.

(ii) In a document titled "Frequently Asked Question (FAQ) Wage Subsidy Program 2.0 Employment Insurance System (EIS), SOCSO No. 6/2020 25 September 2020" which was available publicly, it is stated that the wage subsidy is "financial assistance programs paid to employers for all local employees earning RM4,000 or less" thus the judgment debtor as the employer would still need to pay its employees' salary and the wage subsidy would only function as a "reimbursement".

(iii) In the declaration form to be submitted by an employer in applying the wage subsidy, the employer must declare that the employer "telah dan akan membayar gaji pekerja-pekerja yang terlibat di dalam Program Subsidi Upah (PSU) serta tidak akan menamatkan perkhidmatan pekerja dalam tempoh PSU dan tiga bulan selepasnya" (has paid and will pay salary of employees involved in the Wage Subsidy Program ("WSP") and would not terminate the employee's service within the period of the WSP and three months thereafter).

(iv) The only condition put on the employers in order to receive the financial assistance of wage subsidy is that employers are prohibited from cutting salary and retrenching all employees earning RM4,000 or less and there is no condition for the employers as to how to utilise the wage subsidy.

[29] Learned counsel for the judgment creditor referred to the High Court case of *Tan Way Boon & Ors v. Omar Marican Holdings Sdn Bhd & Ors* [1990] 2 CLJ 700; [1990] 3 CLJ (Rep) 202 for the proposition that a garnishee order can attach debts which the debtor himself is free to deal with at the time the garnishee order *nisi* is served.

[30] It was pointed out to the court that the judgment debtor did not exhibit any documents to support its contention that the monies belong to the employees. The judgment debtor simply made a bare averment without any proof.

[31] In respect of s. 31 of the Employment Act 1955 and *Perwaja Steel Sdn Bhd* (*supra*), the judgment creditor submitted that the reliance of the judgment debtor is taken out of context as *Perwaja Steel Sdn Bhd* is a case whereby the plaintiff company was already in liquidation and a receiver and manager ("R&M") had been appointed. The main issue in that case is whether the

R&M is obliged to make payment of wages owing to the plaintiff's ex-employees out of the proceeds from the sale of properties charged as securities in favour of the defendants secured creditors. In essence, the High Court held that s. 31 of the Employment Act 1955 applies and the wages of employees enjoy priority over the secured creditors. The judgment debtor is not in liquidation and there is also no sale of judgment debtor's properties in this present case so there is no issue of priority on the proceeds of such sale.

[32] In respect of the fifth garnishee, the judgment creditor submitted that the monies in the fifth garnishee do not belong to the members of judgment debtor as early settlement of financing facilities from KOPSYA and Co-opbank. In this regard the judgment creditor submitted and contended as follows:

(i) The early settlement was made to the judgment debtor into its bank accounts by its members but there is no document exhibited by the judgment debtor to show that judgment debtor's right to the monies is subject to interest of KOPSYA and Co-opbank. Since there is no proof of the same, the only inference that can be drawn is that, the monies belong to the judgment debtor and the fifth garnishee is indebted to the judgment debtor.

(ii) It is only a bare allegation of the judgment debtor's assertion that the monies in the fifth garnishee were the early settlement monies of its members which carries no evidential value relying on the Federal Court decision in *Hong Leong Finance Bhd v. Low Thiam Hoe & Another Appeal* [2015] 8 CLJ 1.

(iii) There is no evidence adduced by the judgment debtor to show that the monies in the fifth garnishee belong to KOPSYA or Co-opbank either by way equitable assignment, trust or otherwise.

(iv) As a matter of law, the members of the judgment debtor do not have any right to claim the monies in the judgment debtor's bank account because a cooperative such as the judgment debtor is a separate legal entity from its employees or members capable of holding movable and immovable property in its own name. Any assets including the monies in the fifth garnishee belonged to judgment debtor and not to the employees or members pursuant to s. 9 of the Co-operative Societies Act 1993.

(v) No other parties have a claim over the monies in the fifth garnishee unless they have obtained judgment or taken steps to attach the monies. The judgment creditor relied on the High Court case of *NCFM Enterprise Sdn Bhd v. Kejuruteraan Rasshin Sdn Bhd & Ors* [2011] 10 CLJ 572 for the proposition that a judgment debtor's money in a bank account was not held in trust for a third party creditor when the creditor has not obtained judgment and taken steps to attach the money.

Analysis And Findings

Monies In The First Garnishee

[33] I agree with the judgment creditor's submissions that the wage subsidy is given by the Government under the Prihatin Package to be disbursed to the judgment debtor without condition. Despite the judgment debtor's contention that it is subject to legal action if it fails to disburse the monies in the first garnishee to the judgment debtor's employees, there was no proof provided by the judgment debtor that such a sanction exists.

[34] How the wage subsidy operates is that when the Government gave the wage subsidy to the judgment debtor, this is an assistance to allay the hardship of the judgment debtor who had to continue with the payment of salaries to its employees during the pandemic. The rationale of such an assistance is reflected in the condition imposed on the judgment debtor before it qualifies for the subsidy which are:

(i) the wage subsidy is a financial assistance programs paid to employers for all local employees earning RM4,000 or less as stated in Q&A No. 1 of the frequently asked question sheet issued by PERKESO dated 9 June 2020; and

(ii) the wage subsidy functions as a reimbursement for an employer who pays its employees' salary as demonstrated in para. 2.2 of the Akuan Pengisytiharan PSU50, the employer's declaration form for the Prihatin Package where the employer declares that it has paid and will pay salary of employees involved in the WSP and would not terminate the employee's service within the period of WSP and three months thereafter.

[35] There is no evidence adduced by the judgment debtor to show that there is any condition for the employers as to how to specifically utilise the wage subsidy once this had been received.

[36] Although stated as a "wage subsidy", this is a financial assistance to employers to assist the employers to reduce the financial burden of the employer generally and there is no condition attached to how the wage subsidy is to be specifically disbursed or how the employer accounts for the use of the wage subsidy. Except for some conditions that the employer has to satisfy to be eligible for the wage subsidy, the monies in the first garnishee could be used by the employer to defray its general expenses and liabilities to assist the employer to meet its overall financial obligations including payments to creditors such as the judgment creditor. The salaries of the employees can then be paid and the employer would be able to keep them in employment.

[37] From the above, the court concludes that the judgment debtor was free to deal with the monies in the first garnishee. A garnishee order may be allowed when a judgment debtor is free to deal with the monies/debt from the garnishee. In *Tan Way Boon & Ors v. Omar Marican Holdings Sdn Bhd & Ors* (*supra*) it was held:

> In *Holt's* case (*supra*), which was a case decided in the King's Bench Division by Atkinson J regarding an assignment within the meaning of the English Law of Property Act 1925, the editorial note stated that for the purpose of deciding the question of priority, was it the date on which the assignment became a legal assignment or was it sufficient that an equitable assignment had been executed? *The note stated that upon a review of the cases, the Judge has had regard to the fact that a garnishee order can only attach debts which the debtor himself is free to deal with at the time the garnishee order nisi is served.* (emphasis added)

[38] I also find that the requirement for the creation of a trust in respect of the monies in the first garnishee is not satisfied. There is no "certainty of intention" as there is no evidence adduced by the judgment debtor to show that SOCSO had stated that the wage subsidy was to be used specifically for the purpose of paying the salaries of the judgment debtor's employees.

[39] Section 31 of the Employment Act 1955 is not applicable. For this to be applicable the judgment debtor has to pass the first hurdle which is to show that the monies in the first garnishee are actually "wages due to any employee". For reasons stated above this was not proven to be so. Further, this is not a situation involving the payment of the proceeds of sale of a property under mortgage, charge, lien, decree or debenture as contemplated by s. 31(1) of the Employment Act 1955 which is reproduced below:

> (1) Where by order of a court made upon the application of **any person holding a mortgage, charge, lien or decree** (hereinafter referred to as "the secured creditor") **or in the exercise of rights under a debenture** the property of any person (hereinafter referred to as "the person liable") liable under any of the provisions of this Act to pay the wages due to any employee or to pay money due to any contractor for labour is sold or any money due to the person liable is attached or garnished, the court or the receiver or manager shall not authorise payment of the proceeds of the sale, or of the money so attached or garnished, to the secured creditor or the debenture holder until the court or the receiver or manager shall have ascertained and caused to be paid, out of such proceeds or money, the wages of such employee, or the money due to any contractor for labour under a contract between him and the person liable, which the person liable was liable to pay at the date of such sale, attachment or garnishment. (emphasis added)

[40] I thus have no hesitation in granting order absolute against the first garnishee.

A **Monies In The Fifth Garnishee**

[41] After examining the documents adduced by the judgment debtor, I do not find that the judgment debtor has successfully proven that the monies in the fifth garnishee belong to the members of judgment debtor as early settlement of financing facilities from KOPSYA and Co-opbank for the B following reasons:

(i) The AmBank statement notes that the sum of RM50,501.86 credited by Mohd Zaidi bin Mohd Ali is in full settlement to Agrobank Bhd. This had nothing to do with any settlement to KOPSYA or Co-opbank. The amount credited by Khamsiah Md Yunus has no useful notation to allow C the court to conclude that this was a settlement to Co-opbank.

(ii) The letters dated 24 June 2020 and 17 June 2020 addressed to Mohd Zaidi bin Mohd Ali and Khamsiah Md Yunus make no mention that the payments were for the settlement of the financing to KOPSYA or Co-opbank. In fact, the AmBank statement notes otherwise ie, the payment D by Mohd Zaidi bin Mohd Ali is in full settlement to Agrobank Bhd.

(iii) The Co-opbank letter dated 14 April 2015, as averred by the judgment debtor was in relation to money in the judgment debtor's Co-opbank account and was not in relation to the monies in the fifth garnishee. At best the letter only confirms that Co-opbank has approved a facility for E the judgment debtor's members and nothing else.

[42] If it was true that the monies in the fifth garnishee belong to the members of judgment debtor as early settlement of financing facilities from KOPSYA and Co-opbank and the AmBank account was a collection account, F the judgment debtor should have exhibited documents to this effect, for example, letters of offer or facility agreements relating to these financings. Also, why were subject headings of the letters dated 24 June 2020 and 17 June 2020 addressed to Mohd Zaidi bin Mohd Ali and Khamsiah Md Yunus redacted? This could easily have shown that the payments were in G relation to facilities from KOPSYA and Co-opbank.

[43] The garnishee has the evidential burden to show cause why an order absolute should not be made. This was held to be so by the High Court in *Pernas Trading Sdn Bhd v. Senali Construction Works Sdn Bhd & Anor* [1991] 2 CLJ 1587; [1991] 3 CLJ (Rep) 439 per Peh Swee Chin J (as he then was):

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> Garnishee proceedings are attachment proceedings also, though not in respect of chattels, but of debts. The order for garnishee to show cause that was obtained, though made *ex parte*, was based on some *prima facie* evidence. By analogy to proceedings of attachment of chattels, in a matter of who has to adduce evidence first, the garnishee is like a claimant/ I objector to the chattels attached. That this is right is reinforced by the nature or name of the order *nisi*, that is, the order for garnishee to show

> cause. The burden is shifted to a garnishee in showing cause to prove what he alleges, that he owed no money at the time of the service of the order to show cause. The right or the inconvenience of having to begin first is dependent on which party would fail if no evidence at all were given by either side. Please see s. 102 of Evidence Act.

[44] In my view the judgment debtor must also bear the same burden to prove the same. The judgment debtor's assertion that the monies in the fifth garnishee are the early settlement monies of its members is a bare allegation. See *Hong Leong Finance Bhd v. Low Thiam Hoe & Another Appeal* [2015] 8 CLJ 1 (FC).

[45] The judgment debtor has not adduced any evidence to show that the monies in the fifth garnishee have been assigned to or are held in trust for KOPSYA or Co-opbank. In fact, the judgment debtor has not even established that the members in question received financing facilities from KOPSYA or Co-opbank. Given this, I can only conclude that the monies in the fifth garnishee belong to the judgment debtor.

[46] As for the "direction" of SKM for the judgment creditor to negotiate with the judgment debtor regarding the settlement of the judgment creditor's claims as contended by the judgment debtor, I find this not to be relevant. Paragraph (ix) of the letter only states that this is a recommendation, using the word "dicadangkan" where it was stated:

> ix) Dicadangkan pihak Bank Rakyat mempertimbangkan untuk mengadakan rundingan dengan KOIMAN mengenai kaedah bayaran balik tuntutan pembiayaan serta membuat penstrukturan semula pembiayaan agar bayaran dapat dibuat secara ansuran memandangkan kedudukan kewangan Koperasi yang tidak memuaskan.

[47] The SKM's recommendation is not binding on the judgment creditor or judgment debtor. More importantly, SKM has no power to stop any court proceeding including this proceeding.

[48] Accordingly, order absolute is thus granted against the fifth garnishee.

Conclusion

[49] Considering the totality of the facts and circumstances of the case as disclosed in the affidavit evidence, it was quite clear to me that the judgment creditor had clearly met the requirements to move the court to make the order *nisi* an order absolute. Accordingly, I allowed the judgment creditor's appeals against the learned SAR's decisions and make the order *nisi* as ordered in the garnishee order to show cause dated 9 June 2020 an order absolute.